

**DISABLED****41 CFR Parts 51-2, 51-3, and 51-5****RIN 3037-AA14****Supporting Competition in the AbilityOne Program**

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), operating as the U.S. AbilityOne Commission (Commission), proposes to amend the Commission's regulations to incorporate specific recommendations from the "Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity" (the Panel) review mandated by section 898 of the National Defense Authorization Act (NDAA) for Fiscal Year 2017. The mission of the Panel, in part, was to assess the overall effectiveness and internal controls of the AbilityOne Program related to Department of Defense (DoD) contracts and provide recommendations for changes in business practices. Although the Panel focused on DoD-related procurements, the Commission's proposed revisions will apply to all Procurement List (PL) additions. The proposed revisions will clarify the Commission's authority to consider different pricing methodologies in establishing the Fair Market Price (FMP) for PL additions and changes to the FMP; better define the parameters for conducting fair and equitable competitive allocations amongst multiple qualified Nonprofit Agencies (NPAs); and clarify the responsibilities and procedures associated with authorizing and deauthorizing NPAs.

DATES: The Commission must receive comments on these proposed revisions no later than May 11, 2023.

ADDRESSES: You may submit your comments, identified by "RIN 3037-AA14," by using the following method: Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <https://www.regulations.gov>. To locate the proposed rule, use RIN 3037-

AA14. Follow the instructions for submitting comments. Please be advised that comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Accessible Format: Individuals with disabilities can obtain this document, as well as the comments or other documents in the public rulemaking record for the proposed regulations, in an alternative accessible format by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. You may also access documents of Commission published in the **Federal Register** by using the article search feature at: www.federalregister.gov.

FOR FURTHER INFORMATION CONTACT: Cassandra Assefa, Regulatory and Policy Attorney, Office of General Counsel, U.S. AbilityOne Commission, 355 E Street SW, Suite 325, Washington, DC 20024; telephone: (202) 430-9886; email: cassefa@abilityone.gov. If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

During and after the comment period, you may inspect all public comments about the proposed regulations by accessing *Regulations.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. The AbilityOne Program

The Commission is an independent agency of the Federal Government that consists of a 15-member, Presidentially-appointed Commission, and a career civil service staff. The 15-member Commission consists of four (4) private citizen members and 11 other senior-level government employees from various cabinet-level departments of the Government. The Commission

administers the AbilityOne Program (AbilityOne or the Program) authorized by the Javits-Wagner-O'Day Act (JWOD Act) and its implementing regulations.¹

The JWOD Act directs the Commission to designate Central Nonprofits Agencies (CNAs) to facilitate, by direct allocation, subcontract, or any other means, the distribution of government orders of commodities² and services among NPAs employing individuals who are blind or have significant disabilities. The Commission has designated National Industries for the Blind (NIB), for NPAs that employ individuals who are blind, and SourceAmerica, for NPAs that employ individuals with other significant disabilities, as the national nonprofit organizations that perform the CNA roles and responsibilities.³ Each CNA has a Cooperative Agreement to govern its relationship with the Commission and to establish measurable performance metrics for each CNA.⁴

The JWOD Act authorizes the Commission to determine which commodities or services are suitable for sole-source procurement by the Federal Government and placed on the PL. 41 U.S.C. 8503. Once an item is placed on the PL, only the NPA sources authorized by the Commission may supply the commodity or service to Federal agencies. 41 CFR 51-1.2(a). The significance of being a mandatory source for items on the PL is two-fold. First, Federal agencies do not have to follow normal competitive procedures when acquiring items on the PL. Instead, Federal agencies are required to procure the listed item from the qualified NPAs (and only those NPAs) identified on the PL. Second, a PL addition provides a steady stream of income for NPAs and a catalyst for job creation for individuals who are blind or have other significant disabilities. Currently, the PL generates approximately \$4 billion in revenue for about 450 NPAs in the AbilityOne Program,

¹ 41 U.S.C. chapter 85, Committee For Purchase From People Who Are Blind or Severely Disabled and Code of Federal Regulations, title 41, chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled.

² The Commission recognizes that the Federal Acquisition Regulation (FAR) uses the term “products.” However, “commodity(ies)” is more consistent with the Commission’s existing regulations (41 CFR chapter 51).

³ 41 CFR 51-3.1.

⁴ Agreements can be found at https://www.abilityone.gov/laws,_regulations_and_policy/foia_reading_room.html.

creating or sustaining approximately 40,000 jobs for individuals who are blind or have other significant disabilities.

B. The 898 Panel

Section 898 of the Fiscal Year 2017 NDAA⁵ directed the Secretary of Defense to establish a panel of senior level representatives from DoD agencies, the Commission, and other Federal agencies and organizations to address the effectiveness and internal controls of the Program related to DoD contracts.⁶ The primary mission of the Panel was to identify vulnerabilities and opportunities in DoD contracting with the AbilityOne Program and, at a minimum, to recommend improvements in the oversight, accountability, and integrity of the Program. The Panel established seven subcommittees to fulfill its duties. The Panel was required to provide annual reports to Congress on its activities, starting no later than September 30, 2017, and annually thereafter for the next three years and a final report in 2022.⁷ Of specific relevance to the proposed rule, the Panel formed an Acquisition and Procurement and U.S. AbilityOne Contracting Oversight subcommittee (also known as Subcommittee Six) to address procurement-specific concerns.

Before the Panel's sunset in December 2021, Subcommittee Six made eleven recommendations. The Commission implemented several of those recommendations. The following four recommended actions are now being proposed through this notice of proposed rulemaking (NPRM):

- Require CNAs to consider price, technical capability, and past performance when making an NPA allocation decision.

⁵ Pub. L. 114-328, sec. 898 (2016).

⁶ The Panel consisted of representatives of the Office of the Secretary of Defense and the DoD Inspector General, the U.S. AbilityOne Commission, and the U.S. AbilityOne Commission Inspector General, as statutory members. The Panel's membership also consisted of senior leaders and representatives from the military service branches, Department of Justice, Department of Veterans Affairs, Department of Labor, Department of Education, the General Services Administration, and the Defense Acquisition University.

⁷ Each report can be found at <https://www.acq.osd.mil/asda/dpc/cp/policy/abilityone.html>.

- Establish policy and business rules for competition and re-competition of the PL within the AbilityOne Program.
- Revise 41 CFR part 51 to include information regarding deauthorization of NPAs as the authorized source on the PL.
- Protect, to the maximum extent practicable, the jobs of incumbent employees who are blind or have other significant disabilities if an NPA is deauthorized and its work is reallocated within the AbilityOne.

The Commission found significant utility in the Panel's work and agreed with many of its recommendations. For instance, even though the Panel's efforts were focused on the interplay between AbilityOne and DoD procurements, the Commission recognized that many of the Panel's findings applied to the entire Program. Specifically, the Panel raised numerous concerns about the lack of transparency and perceptions of an unequal playing field in the NPA authorization process. The Commission acknowledges that the process to recommend and authorize an NPA may appear opaque from an outsider perspective. These proposed regulatory changes make affirmative steps toward clarifying the process and modifying the NPA selection process with the goal of best meeting the needs of the Federal customer.

In June 2022, the Commission issued its Strategic Plan for fiscal year (FY) 2022–2026. The document incorporated much of the work of the Panel and serves as a policy road map for the Program over the next five years. The plan is anchored by four Strategic Objectives:

- Expand competitive integrated employment (CIE) for individuals who are blind or have other significant disabilities.
- Identify, publicize, and support the increase of good jobs and optimal jobs in the AbilityOne Program.
- Ensure effective governance across the AbilityOne Program.

- Partner with Federal agencies and AbilityOne stakeholders to increase and improve CIE opportunities for individuals who are blind or have other significant disabilities.

These four objectives represent a deliberate shift to align the Program with contemporary disability policy and modern business practices.⁸ Objective III, Outcome Goal 2, describes how the Commission will “support the mission by providing best value through contract performance.” This goal is consistent with the Panel’s work and the purpose of the proposed rules described herein.

II. Need for Rulemaking

Every item procured on behalf of the Federal Government originates as a requirement for a Federal agency. Under the Program’s current framework, CNAs are responsible for identifying which requirements are “suitable” for the Program and making a recommendation to the Commission for addition to the PL. A suitability recommendation also includes identifying qualified NPAs capable of serving as authorized sources.

In most cases, the CNAs work with Federal agencies to determine which requirements are best suited for a PL addition given the agency’s needs, available funding, and time frame. This initial identification can be made by the Federal agency or by the CNA in search of potential opportunities. After the parties agree that a requirement may be suitable for a PL addition, the CNA issues an opportunity notice (ON) to its network of NPAs. The ON acts as a solicitation to the NPA community, which describes, at a minimum, the requirements, necessary NPA qualifications, the period of performance, and any other special consideration established by the CNA or Commission. If multiple NPAs respond to the ON, the responsible CNA will engage in a NPA selection process to determine which NPA can offer the best overall solution to the Federal agency. NPA selection normally consists of an evaluation of each NPA’s technical capabilities

⁸ AbilityOne Strategic Plan for FY 2022–2026. <https://www.abilityone.gov/commission/strategicplan.html>.

and past performance information. Price, however, is never a consideration at this pre-selection stage. After the CNA identifies the most qualified NPA, it provides a recommendation to the Commission along with all other information pertaining to the overall suitability of the proposed PL addition and enough supporting data to substantiate an initial FMP. The FMP data is generally the byproduct of bilateral negotiations between the NPA and the Federal agency. The Commission staff will often scrutinize the proposed FMP to determine if it is, in fact, a fair price. The FMP is not the lowest or the highest price that could be paid. Instead, the FMP is a reasonable price based on the needs of the Federal agency, market conditions, and the quality of the goods and/or services being provided by the NPA. If the Commission staff concurs with the FMP, the CNA's recommendation and proposed FMP is forwarded to the Commissioners for a vote. If a majority of the Commissioners concur with the recommendation, the suitability determination is affirmed and the initial FMP is established. The Commission then adds the requirement to the PL and authorizes a single NPA to serve as the mandatory source to receive orders from Federal customers. Once the requirement is on the PL, it will normally remain there until no Federal agency needs the requirement or there is no NPA in the Program capable of providing the commodity or service. If, however, there is an ongoing need, Federal agencies must procure the commodity or service from the NPA authorized by the Commission.

The proposed regulatory changes leave the existing NPA recommendation and allocation framework in place, with three modest modifications. First, § 51-2.7 (fair market price) proposes to clarify the Commission's authority to use price competition as a means of determining, establishing, and changing the initial FMP. Second, § 51-3.4 (distribution of orders) proposes to provide a mechanism for Federal agencies to increase their involvement in the allocation process by requesting a competitive distribution. A request for a competitive distribution means the responsible CNA recommends, and the Commission approves, at least two qualified NPAs to function as authorized sources. After which, an allocation would then be issued on a competitive basis to the NPA that can provide the "best overall solution" to the Federal customer. Lastly,

proposed § 51-5.2 (mandatory source requirement) clarifies the Commission's authority to authorize and deauthorize NPAs and adds additional protections to employees when work is transferred between NPAs.⁹ These changes are intended to modernize the Program and to better align it with the needs of the Federal customer.

III. Specific Proposed Changes to 41 CFR Parts 51-2, 51-3, and 51-5

A. Section 51-2.7 (Fair market price). Section 8503(b) of the JWOD Act states that the Commission "shall determine the fair market price of commodities and services contained on the [PL] that are offered for sale to the Federal Government by a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled." As noted above, the current process only calls for considering an NPA's Program-specific qualifications, technical rating, and past performance. Price, however, is only considered and negotiated after an NPA has been selected. 41 CFR 51-2.7. This is prudent in many situations, especially when there is sufficient market data to validate the sufficiency of those negotiations. However, in some instances, the complexity, varied market conditions, and/or uniqueness of the requirement make bilateral negotiations less feasible for establishing the FMP. In those instances, using competitive market forces as a factor for establishing the FMP would be more beneficial to the Commission in meeting its statutory obligation.

To test the efficiency of considering price on a competitive basis, the Commission pilot-tested two procurements that included price in the NPA recommendation process. The pilot tests demonstrated that including price as a factor, coupled with a "customer-focused" selection ethos, can provide promising results for the Federal customer and the AbilityOne Program.¹⁰ It also provided the Commission a reliable baseline on which the Commission could rely in establishing the FMP. The inclusion of price as an evaluation factor was not used as an attempt by the Commission to prioritize price over all other factors. Instead, price was subordinate to

⁹ The Commission acknowledges the Panel's additional recommendations; however, this proposed rule is intended only to address the Panel's recommendation related to competition and is not meant to address all recommendations.

¹⁰ Information on file at the AbilityOne Commission (available upon request).

performance history to emphasize the Federal agency’s desire to identify NPAs with a strong performance record, and a commitment to customer satisfaction. Again, a fair market price is not the lowest price or the highest price the market will bear, but rather the fairest price supported by adequate research and market considerations.

Current Regulation: The Commission’s current regulations permit bilateral price negotiations between the NPA and contracting agency rather than leveraging competitive market forces. The regulation states, in part, that “other methodologies” (like price competition) can be used, “if agreed to by the negotiating parties.” The regulation also states, in relevant part, that “[p]rices are revised in accordance with changing market conditions which include negotiations between contracting activities and producing nonprofit agencies, assisted by central nonprofit agencies, or the use of economic indices, changes in nonprofit agency costs, or other methodologies permitted under these procedures” (§ 51.2-7(b)) and that “recommendations for initial fair market prices, or changes thereto, shall be submitted jointly by the contracting activities and nonprofit agencies concerned to the appropriate central nonprofit agency” (§ 51-2.7(c)).

Rationale for Proposed Change: The Commission is concerned that the provision “if agreed to by the negotiating parties” in § 51.2-7(a) could be misinterpreted to mean that the Commission cannot consider other methodologies (such as price competition) in establishing the initial FMP unless the NPA and contracting activity also agree. Such a reading is not consistent with the Commission’s statutory authority to establish the FMP or the general thrust of the regulation.¹¹

In fact, a recent decision at the Court of Federal Claims (COFC) held the following:

This is not to say that introducing a price component can never be utilized in AbilityOne procurements, nor that use of competitive pricing may not be advantageous to the United States. On the contrary, the Court only holds that the agency may not depart from its enabling statutes and its own

¹¹ See, e.g., *Melwood Horticultural Training Center, Inc. v. United States*, 153 Fed. Cl. 723, 737 (2021).

regulations by adopting policies that conflict with the statutory and regulatory scheme.¹²

The COFC found that the price component at issue in this case conflicted with the “collaborative pricing process” contemplated under 41 CFR 51-2.7 (negotiations with the nonprofit contractor, the contracting activity, and the central nonprofit agency). The COFC added that “other methodologies” (aside from negotiations) are permissible, but only if the parties agree to a deviation from this process. § 51-2.7(a). The JWOD Act, however, unambiguously authorizes the Commission to establish the FMP and to revise it “in accordance with changing market conditions.”¹³ As such, the Commission believes it has the discretion to use the most appropriate pricing methodology when it initially establishes or changes the FMP and is not limited solely to an agreement of the negotiating parties as interpreted by the Court. The proposed changes to § 51-2.7 are intended to harmonize the statute and regulation to eliminate any ambiguity surrounding the Commission’s authority to establish the FMP, by making it clear that an agreement between the parties is not required for the Commission to utilize other pricing methodologies (including price competition) to establish or change the FMP.

Proposed Regulation: The proposed changes to § 51-2.7 eliminate the ambiguity surrounding the Commission’s authority to establish the FMP. The proposed regulation amends paragraph (a) by removing “if agreed to by the negotiating parties” and replacing the existing text with “the price can be based on market research, comparing the previous price paid, price competition, or any other methodology specified in Committee policies and procedures.” This change makes clear that agreement by the parties is not required in establishing the FMP and adds examples of other bases upon which FMP can be based. The proposed regulation also amends paragraph (b) to state that the FMP may be revised in accordance with methodologies established by the Committee,

¹² *Melwood Horticultural Training Center, Inc. v. United States*, 153 Fed. Cl. 723, 737 (2021).

¹³ 41 U.S.C. 8503(b). It should be noted that a “collaborative pricing process” is not contemplated under the statute. The authority to establish the FMP rests solely with the Commission.

which include the addition of price competition. Lastly, the proposed rule removes the language currently at § 51-2.7(c) requiring the initial FMP, or changes thereto, to be submitted jointly by contracting activities and NPAs to the CNA (§ 51-2.7(c)). The contracting activities and NPAs may still submit prices jointly as a matter of Commission policy, but such a requirement would only be applicable if bilateral negotiations is the method the Commission chooses to use to determine the FMP.

B. *Section 51-3.4 (Distribution of orders)* - CNAs have explicit statutory authority “to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled.” 41 U.S.C. 8503(c). A distribution can only occur, however, after the Commission has authorized at least one NPA to serve as a mandatory source.

Current Regulation: The current regulation states that the CNA “shall distribute orders from the government only to nonprofit agencies which the Committee has approved,” and, “[w]hen the Committee has approved two or more nonprofit agencies to furnish a specific commodity or service,” the CNA shall distribute the order “in a fair and equitable manner.”

Rationale for Proposed Change: Under the current structure, the CNAs typically recommend a single NPA to provide a commodity or service to the Federal customer. The CNAs consider numerous factors before recommending an NPA to the Commission, but the priorities of the Federal customer aren’t always effectively articulated throughout the recommendation process.¹⁴ Nevertheless, once that recommendation is made and the Commission authorizes the recommended NPA to serve as a mandatory source, the CNA must distribute orders to that NPA and only that NPA as long as the commodity or service remains on the PL. Since NPAs in the Program vary in sophistication and technical expertise, where two or more NPAs have been approved to provide a service, the competitive distribution option will be limited to only services

¹⁴ *Supra* note 5.

contracts where the total contract value exceeds \$10 million¹⁵ or in instances where bilateral negotiations have failed. The proposed language emphasizes the priorities of the Federal customer for specific allocations and creates a framework for the Federal agency to utilize the competitive distribution option for any service contract with a total contract value exceeding \$10 million. This rule proposes to allow the Commission to opt for a competitive allocation for services contracts with a total contract value at or below \$10 million due to an impasse in bilateral negotiations regarding price. It is important to emphasize that the competitive distribution option may only be utilized for services contracts, not contracts for commodities. These changes are intended to provide all Federal agencies access to competitive distributions while also allowing the Commission to have the flexibility to approve requests and tailor execution consistent with the Commission's available resources, personnel, and the needs of the Program.

Proposed Regulation: The process for recommending, authorizing, and distributing orders to NPAs will continue to be done in a "fair and equitable manner," but each allocation will be made to the NPA that provides the "best overall solution" for the Federal customer. This rule proposes to amend § 51-3.4 to impose new requirements as to how a CNA must distribute orders for certain services contracts among two or more approved NPAs. First, this rule proposes to remove the language requiring CNAs to distribute orders to NPAs in a "fair and equitable manner" and replace the existing text with "in a manner that provides the best overall solution for the Federal customer." This rule also proposes to add new paragraphs (b), (c), (d), and (e), which impose additional requirements for new and existing PL additions. For service requirements that are expected to exceed \$10 million in total contract value, the Federal customer may request, subject to the Commission's approval, that the procurement be distributed on a competitive basis among all authorized NPAs (proposed § 51-3.4(b)). For service requirements equal to or less than \$10 million in total contract value, the Commission may direct a competitive distribution for an

¹⁵ Total contract value consists of the base period plus all option periods.

existing PL service requirement in instances where good faith sole source negotiations have failed to produce an agreeable price (proposed § 51-3.4(c)). Finally, this rule also proposes to provide guidance for NPA selection and the Federal customer's obligations in requesting a competitive distribution (§ 51-3.4(d)) and establishes a framework for resolving a dispute arising out of a competitive distribution decision (§ 51-3.4(e)).

C. Section 51-5.2 (Mandatory source requirement) - The Commission is responsible for placing and removing items from the PL and authorizing and deauthorizing qualified NPAs to serve as mandatory sources. 41 CFR 51-2.2(b).

Current Regulation: The current regulation states, in relevant part, that “[n]onprofit agencies designated by the Committee are mandatory sources of supply for all entities of the Government for commodities and services included on the Procurement List” (§ 51-5.2(a)), “[p]urchases of commodities on the Procurement List by entities of the Government shall be made from sources authorized by the Committee” (§ 51-5.2(b)), “[c]ontracting activities shall require other persons providing commodities which are on the Procurement List to entities of the Government by contract to order these commodities from the sources authorized by the Committee” (§ 51-5.2(c)), and “[c]ontracting activities procuring services which have included within them services on the Procurement List shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies designated by the Committee” (§ 51-5.2(e)).

Rationale for Proposed Regulation: Before an item is added to the PL, the Commission must find that the commodity or service is “suitable” for addition. 41 CFR 51-2.4. The Commission's regulations require that the suitability of a commodity or service be evaluated on four criteria: 1) employment potential, 2) the qualifications of the proposed NPA(s), 3) the capability of the proposed NPA(s), and 4) the level of impact on the current contractor. 41 CFR 51-2.4(a). Under the Commission's regulations, the suitability determination “approves” a commodity or service for PL addition and “authorizes” at least one NPA to serve as a mandatory source. The current

regulation at § 51-5.2 does not explicitly assert the Commission's authority to authorize or deauthorize an NPA.¹⁶ It is also silent on an NPA's responsibilities for the incumbent workforce when work is transferred from one NPA to another. This rule proposes changes to § 51-5.2 to clarify the Commission's authority to authorize and deauthorize NPAs and add additional protections for incumbent employees when work is transferred between NPAs.

Proposed Regulation: The proposed changes clarify the Commission's authority to authorize and deauthorize NPAs to serve as mandatory sources and to transfer work within the Program. The Commission proposes to amend the text of paragraph (a) to state that the Committee may authorize one or more NPAs to provide a requirement on the PL; that NPAs authorized as mandatory sources remain on the PL until the NPA has been deauthorized by the Committee; and that CNAs may allocate to one or more NPAs a commodity or service on the PL. This rule also proposes to amend paragraph (b) to state that the Committee will authorize the most capable NPA as a mandatory source and paragraph (c) to clarify that contracting activities shall require that their contract with others, such as prime vendors, providing commodities already on the PL to the Federal agency, must order these commodities from Committee authorized sources. We also propose to change the language in paragraph (e) to state that contracting activities procuring services must procure included PL commodities in addition to services from the NPA "authorized" in lieu of "designated" by the Committee. Lastly, the proposed changes also include a new paragraph that includes an affirmative requirement to protect and retain employees who are blind or have other significant disabilities when a project is transferred to another NPA within the Program (proposed § 51-5.2(f)).

VI. Regulatory Procedures

A. *Applicability of E.O. 12866 and 13563*

¹⁶ 41 CFR 51-2.2(b) provides that the Committee has the power and responsibility to authorize and deauthorize central nonprofit agencies and nonprofit agencies to accept orders from contracting activities for the furnishing of specific commodities and services on the PL.

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this will be a significant regulatory action and, therefore, is subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

B. *Expected Impact of Proposed Rule*

While the proposed changes are applicable to all NPAs, the Commission estimates that they would have the most impact on approximately 27 percent or 122 of the 450 NPAs currently qualified to participate in the Program.¹⁷ This group of NPAs performs approximately 346 services contracts, which total an annual revenue of roughly \$3.07 billion.¹⁸ Half of that amount (\$1.63 billion), is concentrated amongst 23 qualified NPAs.¹⁹ In addition, these rule changes would apply equally across all Federal agencies, but the Department of Defense (DoD) would be impacted the most, accounting for approximately 79 percent of the \$3.07 billion (\$2.41 billion) in AbilityOne service contracts annually.

Lastly, service contracts are typically renewed once every five years. This means that, on average, up to one-fifth of all applicable AbilityOne service contracts (69 per year) would be subject to the proposed changes in any given year. In terms of dollar amount, this would subject approximately \$614 million in contract dollars to a possible competitive distribution on an

¹⁷ This number is based on the total number of NPAs within the Program that have at least one contract that exceeds \$10 million in total contract value. These estimates do not account for impasse occurrences which historically are rare with an average of two each year based on data from the last five years. Information on file at the AbilityOne Commission (available upon request).

¹⁸ Information on file at the AbilityOne Commission (available upon request).

¹⁹ *Id.*

annualized basis.²⁰ The exact amount for any given year would be based on the number of requests received and approved by the Commission.

Benefits of Proposed Rule²¹

Both CNAs already use a competitive approach when recommending NPAs to the Commission to serve as mandatory sources for a vast majority of new PL additions.²² The largest criticism to current practice is the perceived lack of transparency in the NPA selection process, a perception of NPA complacency after receiving an authorization, and the inability to consider price on a competitive basis when selecting an NPA.²³ The proposed regulatory changes will directly address each concern by providing greater customer involvement in NPA selection, creating a mechanism to incentivize better performance, and encouraging more competitive pricing.

i. *Increased Transparency* – For PL additions of more than \$10 million in total contract value, inclusive of the base period and all options periods, the proposed changes provide Federal agencies the option to request a competitive allocation. A significant component of that request requires the Federal agency to state “whether it will provide resources to support the process.” The Federal agency is not required to provide resources, but the Commission has found great utility in involving the Federal customer in assisting with evaluating NPA technical capabilities, past performance, and pricing. In 2019 and 2021, the Commission conducted competitive NPA selection pilot tests, leveraging the resources of the Federal agency’s responsible contracting activity.²⁴ In both instances, the Federal agency provided an invaluable mix of engagement and expertise throughout the entire process. However, the ultimate decision for selecting the

²⁰ Based on an extrapolation of available data and estimated contract expiration dates, the number of possible requests would be 28, 69, 99, 79, and 69 for FY 2021, FY 2022, FY 2023, FY 2024, and FY 2025, respectively. The Commission believes, for purposes of this proposed rule, using the average number is appropriate.

²¹ The changes discussed in this rulemaking are separate and distinguishable, but collectively all three rules are designed to enhance competition within the Program. The benefits in this section address the impact on all three proposed changes collectively.

²² *Supra* note 12.

²³ Available at, <https://abilityone.oversight.gov/reports/2022/898-panel-issues-fourth-and-final-annual-report-congress>, pp 26-27.

²⁴ Information on file at the AbilityOne Commission (available upon request).

servicing NPA always fell within the purview of the Commission's authority and will remain within the purview of the Commission under the proposed rule.

ii. *Incentivize Better Performance* – The AbilityOne Program was created to allow Federal agencies to issue orders on a sole-source basis to qualified NPAs. The competitive procedures proposed herein will not change that. In fact, service requirements below the threshold will not be significantly impacted by the proposed changes and commodities are not subject to the changes for competitive distributions. However, NPAs involved in servicing higher dollar requirements will have to be more responsive to market forces and innovative practices to maintain its place as a mandatory source. The Commission believes that the prospects of a competitive allocation every five to ten years is an appropriate motivator.

The proposed rules also provide a CNA a more effective means for replacing a poor performing NPA, without resorting to granting a Federal agency a purchase exception to procure the requirement *outside* the Program. Instead, the proposed changes will encourage CNAs to identify as many capable NPAs as possible when a PL addition is initially established. If, in the unlikely event, the originally selected NPA falls well short of expectations, the responsible CNA can make a re-allocation amongst the other authorized NPAs.

iii. *More Competitive Pricing* – The AbilityOne Program has been a trusted source to Federal agencies since 1938. To remain a trusted source, qualified NPAs must deliver high-quality commodities and services in a timely manner at a competitive price. The two test pilots completed in 2019 and 2021 provide a proof of concept to the potential cost savings that might be generated through competition. The first competitive pilot test was conducted for the Ft. Bliss Facilities Support and Operations Services (FSOS) contract, initially valued at \$66.7 million per year and resulted in a contract award of \$59.5 million per year, an annual savings of \$7.2 million (\$39.6 million over the entire performance period) or a 12% reduction.²⁵ The second pilot test for the Ft. Meade Maintenance and Repair Services contract was valued at \$19.6 million per year.

²⁵ *Id.*

The new price would have been \$16.8 million per year, an annual savings of \$2.8 million (\$14 million over the entire performance period) or a 17% reduction.²⁶ These results suggest that price competition at the pre-selection stage, when compared to bilateral negotiations after NPA selection, can have some very tangible benefits to the Federal Government through cost savings.

Cost of Proposed Rule²⁷

The Commission believes that the potential costs from implementation of the proposed changes are greatly outweighed by the benefits to the NPA community, the CNAs, and the Federal Government.

i. *Cost to NPAs* – The Commission believes that the only additional cost that might be attributed to these proposed rules for *new* PL additions is the cost an NPA would incur if it is required to include pricing information in its response to an ON. For *existing* requirements, the only meaningful cost might be proposal preparation cost and possible phase-out cost to the incumbent NPAs if they do not receive a re-allocation after a competitive distribution and must transfer the incumbent workforce to the new NPA.

a. New PL Additions Without an Incumbent NPA: When a CNA issues an ON, NPAs are already required to prepare and submit a competitive response. Responses will provide, at a minimum, information regarding the NPA's qualifications, technical capabilities, and past performance information. It does not, however, provide pricing until after the field has been narrowed down to a single NPA. At that stage, the successful NPA will enter bilateral price negotiations with the Federal customer. Under the proposed rule § 51-2.7(a), it is permissible to include price as a factor as part of the ON. If price is used as a factor, responding NPAs might incur some cost if required to include pricing data in the initial response to the ON. However, since each responding NPA is

²⁶ *Id.*

²⁷ The changes discussed in this rule making are separate and distinguishable, but collectively all three rules are designed to enhance competition within the Program. The costs in this section address the impact on all three proposed changes collectively.

already on notice that pricing information will be needed to ultimately secure a recommendation, this change would only alter when the NPA must submit it and how it is used.

b. Existing PL Services with an Incumbent NPA: For existing service requirements, the only meaningful cost might be proposal preparation cost and possible phase-out expenses to the incumbent NPAs for the approximately 346 service requirements potentially impacted by a competitive distribution. Under current practice, an incumbent NPA will generally only be displaced by another NPA if it cannot meet the Government's requirements in a satisfactory manner. Otherwise, an NPA will continue to serve as a mandatory source for the life of an existing requirement. Under the proposed rule changes, a Federal agency may request a *re-allocation* on a competitive basis for a service requirement exceeding \$10 million in total contract value, inclusive of the base period and all option periods, or the Commission may direct a competitive re-allocation in instances where bilateral negotiations have failed. If the Commission approves the Federal agency's request for a competitive re-allocation, or if the Commission directs competitive re-allocation after an impasse in negotiations, the incumbent may incur cost in preparing a competitive proposal. If it is displaced, it may incur transition costs, but a vast majority of those costs may be reimbursable under the existing Federal contract. A displaced incumbent NPA would also lose the revenue from the lost allocation. However, from a programmatic perspective, the revenue would remain within the Program because the work would continue to be performed by another qualified NPA. Secondly, proposed rule § 51-5.2(f) requires the losing and gaining NPAs to work together to ensure that any adverse impacts on the incumbent workforce are mitigated to the maximum extent practicable.

ii. *Cost to CNAs* –The most significant cost that the CNAs would incur are the costs for the approximately 346 PL services that might be selected for a price-inclusive competitive

allocation. Of that number, all but ten would fall to SourceAmerica, which has reported to the Commission that it would need 14 full-time equivalents (FTEs) in additional staff or \$1.5 million annually to handle the potential increase in workload. However, such costs assume that the Commission would approve every eligible PL service for a competitive distribution. As noted above, the discretionary nature of each request and the Commission's discretion under the proposed rule to determine whether a competitive distribution is appropriate provides the Commission the flexibility to control the number of approved requests based on resource availability.

While competitive distributions may be more resource intensive for CNAs than the status quo, the potential additional costs to CNAs may be offset by increased participation by the Federal customer. For instance, during the competitive pilot for Fort Bliss, the Federal customer provided no less than 7 FTEs of general staff and evaluation support (i.e., technical evaluation, past performance, and pricing). In any event, the Commission recognizes that competitive distributions might be more resource intensive than the status quo, but many of those costs will be offset by increased participation from the Federal customer and improved customer satisfaction. Additionally, a price impasse because of failed bilateral price negotiations could take multiple bridge contracts and hundreds of additional man-hours to establish the price for a follow-on contract. In those instances, a competitive allocation would reduce the administrative burden for both the CNA and Federal customers by allowing market conditions to be a more determinative factor.

iii. *Cost to Federal Customers* – The Commission anticipates that the cost to the Federal customer will vary depending on how much support it provides to the Commission and the responsible CNA in carrying out a competitive distribution. In most instances, the Federal customer will be expected to provide personnel to assist with the technical evaluation, past performance evaluation, and price analysis. Additionally, each time an existing PL service requirement is re-allocated, there may be some disruption to contract performance and

administrative cost associated with replacing an incumbent contractor. However, this cost would only be incurred if the Federal customer determines that a re-allocation is more advantageous to the Federal Government than maintaining the status quo.²⁸

iv. *Cost to the AbilityOne Commission* – According to analysis derived from the two pilot tests, the Commission would need to dedicate additional FTEs consisting of a competition lead, additional attorney advisors, a contract specialist, and several price analysts.²⁹ Absent additional personnel, the Commission would only be able to support a small number of competitive distributions. The agency would need to budget an additional \$800,000-\$1.2 million annually to account for the personnel needed to support a competitive allocation for each PL addition in excess of \$10 million in total contract value.³⁰ However, the Commission will largely be able to mitigate additional cost in the following ways:

- a. Limited Scope: The Section 898 Panel recommended that a competitive process apply to those service requirements with an annual value of \$10 million per year. It also recommended that competitive distributions be mandatory.³¹ The proposed rule changes allow for competitive distributions on service contracts that are greater than \$10 million in total contract value or in instances where bilateral negotiations have failed, and application of a competitive distribution is not mandatory. The discretionary nature of competitive distributions under the proposed rule provides the Commission the flexibility to approve requests and tailor execution consistent with the Commission's available resources, personnel, and the needs of the Program.

²⁸ The cost will vary by Federal agency. The Commission will have more information from the After Action Response (AAR) on the Fort Bliss Competitive Pilot test. The results of the pilot will be posted on our website and will also be available by request.

²⁹ Information on file at the AbilityOne Commission (available upon request).

³⁰ This estimate is based on hiring an additional 8-12 FTEs at an average cost of \$100K per person.

³¹ *Supra* note 18.

- b. Leveraging personnel from the Federal customers: By placing a vast majority of the resource burden for conducting competitive distributions on the responsible CNAs and the requesting Federal agency, the Commission can focus on providing better oversight and compliance. For CNAs, the resource burden is only slightly more than the status quo, and for the Federal customer all additional costs are dedicated to supporting NPA evaluations (i.e., technical experts, pricing analysis, etc.).

D. *Regulatory Flexibility Act* – The Committee does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, *et seq.*, because it does not include any new reporting, recordkeeping, or other compliance requirements for small entities. The proposed rule only establishes business rules to improve the AbilityOne Program processes. This proposed rule also does not duplicate, overlap, or conflict with any other Federal rules. However, it has not yet been certified as to whether it is subject to the Regulatory Flexibility Act (5 U.S.C. 601).

E. *Unfunded Mandate Reform* – This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

F. *Paperwork Reduction Act* – This proposed rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

G. *Small Business Regulatory Enforcement Fairness Act of 1996* – This proposed rule would not constitute a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or

on the ability of the United States-based companies to compete with foreign based companies in domestic and export markets.

List of Subjects

41 CFR Part 51-2

Government procurement, Individuals with disabilities, Organization and functions (Government agencies).

41 CFR Parts 51-3 and 51-5

Government procurement, Individuals with disabilities.

For reasons set forth in the preamble, the Commission proposes to amend 41 CFR parts 51-2, 51-3, and 51-5 as follows:

PART 51-2—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

1. The authority citation for part 51-2 is revised to read as follows:

Authority: 41 U.S.C. 46-68c

2. Amend § 51-2.7 by:

- a. Revising the second and third sentences and removing the fourth sentence of paragraph (a); and
- b. Revising paragraphs (b) and (c).

The revisions read as follows:

§ 51-2.7 Fair market price.

(a) * * * The Committee is responsible for determining fair market prices, and changes thereto, for commodities and services on the Procurement List. The initial fair market price may be based on bilateral negotiations between contracting activities and authorized nonprofit agencies, market research, comparing the previous price paid, price competition, or any other methodology specified in Committee policies and procedures.

(b) The initial fair market price may be revised in accordance with the methodologies established by the Committee, which include sole source negotiations between contracting activities and producing nonprofit agencies assisted by central nonprofit agencies, the use of economic indices, price competition, or any other methodology permitted under the Committee's policies and procedures.

(c) After review and analysis, the central nonprofit agency shall submit to the Committee the recommended fair market prices and, where a change to the fair market price is recommended, the methods by which prices shall be changed to the Committee, along with the information required by Committee pricing procedures to support each recommendation. The Committee will review the recommendations, revise the recommended prices where appropriate, and establish a fair market price, or change thereto, for each commodity or service which is the subject of a recommendation.

PART 51-3—CENTRAL NONPROFIT AGENCIES

3. The authority citation for part 51-3 continues to read as follows:

Authority: 41 U.S.C. 46-48c.

4. Revise § 51-3.4 to read as follows:

§ 51-3.4 Distribution of orders.

(a) Central nonprofit agencies shall distribute orders from the Government only to nonprofit agencies which the Committee has authorized to furnish the specific commodity or service. When the Committee has authorized two or more nonprofit agencies to furnish a specific commodity or service, the central nonprofit agency shall distribute orders among those nonprofit agencies in a manner that provides the best overall solution for the Federal customer.

(b) For new and existing Procurement List services that are estimated to exceed \$10 million in total contract value, inclusive of the base period and all option periods, the Federal customer may request that the procurement be distributed on a competitive basis among all authorized nonprofit agencies. The Committee will determine whether a competitive distribution

is appropriate. The nonprofit agency selected through a competitive distribution is the nonprofit agency that the Committee has determined provides the best overall solution for the Federal customer after considering such factors as technical capability, past performance, and price. Depending on the needs of the Federal customer, factors may be weighted. Price shall not be the only factor in a distribution decision.

(c) The Commission may also direct a competitive distribution in accordance with paragraph (b) of this section for any service already on the Procurement List (regardless of dollar amount) if the sole source negotiations described at § 51-2.7(b) of this chapter fail to produce a price acceptable to both parties for a follow-on procurement.

(d) In addition to the requirements described at part 51-6 of this chapter, the requesting Federal customer shall advise the Committee of the rationale for competition, whether it will provide resources to support the process, the estimated cost, any information pertaining to performance by any independent contractor, and such other information as is requested by the Committee.

(e) Any dispute arising out of a competitive distribution decision described at paragraph (b) of this section shall be submitted to the appropriate central nonprofit agency for resolution. If the affected nonprofit agency disagrees with the central nonprofit agency's distribution decision, it may appeal that decision to the Committee for final resolution. Appeals must be filed with the Committee within five business days of the nonprofit agency's notification of the central nonprofit agency's distribution decision, and only a nonprofit agency that participated in the competitive distribution process described at paragraph (b) of this section may appeal.

PART 51-5—CONTRACTING REQUIREMENTS

5. The authority citation for part 51-5 continues to read as follows:

Authority: 41 U.S.C. 46-48c.

6. Amend § 51-5.2 by revising the section heading and paragraphs (a), (b), (c), and (e) and adding paragraph (f) to read as follows:

§ 51-5.2 Authorization/deauthorization as a mandatory source.

(a) The Committee may authorize one or more nonprofit agencies to provide a commodity or service on the Procurement List. Nonprofit agencies that have been authorized as mandatory sources for a commodity or service on the Procurement List are the only authorized sources for providing that commodity or service until the nonprofit agency has been deauthorized by the Committee. To meet the needs of the Federal customer, the central nonprofit agencies may allocate the commodity or service to one or more nonprofit agencies as appropriate.

(b) After a determination of suitability for approving items on the Procurement List, the Committee will authorize the most capable nonprofit agencies as the mandatory source(s) for commodities or services. Commodities and services may be purchased from nonprofit agencies; central nonprofit agencies; Government central supply agencies, such as the Defense Logistics Agency and General Services Administration; and certain commercial distributors. (Identification of the authorized sources for a particular commodity may be obtained from the central nonprofit agencies indicated by the Procurement List which is found at www.abilityone.gov.)

(c) Contracting activities shall require that their contracts with other organizations or individuals, such as prime vendors providing commodities that are already on the Procurement List to Federal agencies, require that the vendor order these commodities from the sources authorized by the Committee.

* * * * *

(e) Contracting activities procuring services, which have included within them services on the Procurement List, shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies authorized by the Committee.

(f) If the Committee deauthorizes a nonprofit agency as the mandatory source, the deauthorized nonprofit agency shall ensure as many of its employees who are blind or have other significant disabilities as practicable remain on the job with the new authorized successor nonprofit agency. The successor nonprofit agency is required to offer a right of first refusal of employment under the successor contract to current employees of the deauthorized nonprofit agency who are blind or have other significant disabilities for positions for which they are qualified. The deauthorized nonprofit agency shall disclose necessary personnel records in accordance with all applicable laws protecting the privacy of the employee to allow the successor nonprofit agency to conduct interviews with those identified employees. If selected employees agree, the deauthorized nonprofit agency shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits and other relevant employment and Program eligibility information to the successor nonprofit agency. The requirement to offer the right of first refusal also applies if a nonprofit agency loses an allocation because of a competitive distribution under § 51-3.4(b) of this chapter.

Michael R. Jurkowski,

Acting Director, Business Operations.